

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARMEN ERNST)	
Claimant)	
VS.)	
)	
USD 267)	Docket No. 1,023,547
Respondent)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 27, 2006. Claimant was awarded temporary total disability for the period from September 16, 2005, to November 16, 2005. Additionally, respondent was ordered to pay penalties in the amount of \$871.00, representing \$100.00 per week for 8.71 weeks from September 16, 2005, to November 16, 2005.

ISSUES

Respondent raises the following issues in its Application For Review By Board Of Appeals:

1. Whether the Administrative Law Judge erroneously awarded temporary total disability benefits in a penalty hearing.
2. Whether the Administrative Law Judge erred in awarding penalties when the uncontroverted evidence establishes that claimant was not temporarily totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of Administrative Law Judge Nelsonna Potts Barnes should be reversed.

This matter first went to preliminary hearing on September 29, 2005. At that time, in an Order dated October 3, 2005, the Administrative Law Judge (ALJ) awarded claimant temporary total disability payments beginning June 17, 2005, and continuing through August 22, 2005. The Order also noted the parties' agreement that claimant was entitled to temporary total disability "until she is provided comparable paying accommodated work" and "claimant shall be entitled to temporary total disability if she is taken off work by any of her authorized treating physicians."¹ Temporary total disability for the period from September 16, 2005, to November 16, 2005, was not specifically addressed in the October 3, 2005 Order.

On September 14, 2005, Steven J. Howell M.D., claimant's treating physician, returned claimant to work. Dr. Howell's note of that date specifies it is "OK to Drive A Bus."² Respondent then stopped claimant's temporary total disability. In his office note of November 16, 2005, Dr. Howell released claimant to return to work without restrictions.³

On October 6, 2005, claimant filed her Demand for Compensation, requesting, among other things, "temporary total disability and/or temporary partial disability." This was followed by claimant's Application for Penalties, filed on November 14, 2005, pursuant to K.S.A. 44-512a and K.S.A. 44-512b. The matter was noticed for hearing on January 26, 2006.⁴ From that hearing, the January 27, 2006 Order was issued.

Respondent first argues the ALJ inappropriately ordered temporary total disability compensation in a penalties hearing. The Board acknowledges that compensation hearings and K.S.A. 44-512a actions are separate and distinct.⁵ However, in this instance, the application for penalties was properly filed, and the notice for a preliminary hearing was

¹ Order (Oct. 3, 2005) at 2.

² Motion Hearing Trans. (January 26, 2006), Resp. Ex. 1.

³ Motion Hearing Trans. (January 26, 2006), Resp. Ex. 3.

⁴ Notice of Penalties Hearing (Nov. 30, 2005).

⁵ *Crow v City of Wichita*, 222 Kan. 322, 566 P. 2d 1 (1977).

also timely provided. The Board finds no error in the ALJ's procedure in combining the two issues for hearing.

The Board does, however, question the ordering of penalties for a period of temporary total disability benefits that had not been previously ordered. K.S.A. 44-512a allows penalties for weeks when compensation is "past due". Here, no compensation was past due as none had been ordered for the period in question. To award penalties in this situation violates K.S.A. 44-512a. The Board, therefore, reverses the award of penalties in this matter.

Respondent also questions claimant's entitlement to additional temporary total disability compensation. Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

Claimant's entitlement to temporary total disability is not an issue over which the Board takes jurisdiction from a preliminary hearing appeal.⁷

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 27, 2006, should be, and is hereby, reversed with regard to the order for penalties, but otherwise remains in full force and effect.

IT IS SO ORDERED.

⁶ K.S.A. 44-534a(a)(2).

⁷ K.S.A. 44-534a.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director